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Nos. 02-241 & 02-516

In the Supreme Court of the United States

BARBARA GRUTTER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF SOCIAL SCIENTISTS GLENN C. LOURY, NATHAN GLAZER, JOHN F. KAIN, THOMAS J. KANE, DOUGLAS MASSEY, MARTA TIENDA AND BRIAN BUCKS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, Professors Glenn C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, and Marta Tienda submit this brief as *amici curiae* in support of Respondents Lee Bollinger, *et al.*[1] All parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs in this case.

Amici are scholars who have studied the effects of race-conscious admissions programs or "race-neutral" alternatives to those programs.

Glenn Loury is a University Professor and Professor of Economics at Boston University. He is also Director of Boston University's Institute on Race and Social Division, a multidisciplinary research center examining the causes, consequences, and methods of resolution of divisive conflicts between social groups within the modern nation-state. He has written extensively on affirmative action. He is the author of *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America*, which won the 1996 American Book Award and the 1996 Christianity Today Book Award. His most recent book, *The Anatomy of Racial Inequality*, was published last year.

Nathan Glazer is Professor of Education and Sociology Emeritus at Harvard University. He is a former editor of *Commentary* and from 1973 to 2002 was co-editor of *The Public Interest*. He is the author of numerous books and articles including, *American Judaism*, *Beyond the Melting Pot* (with Daniel P. Moynihan), *Affirmative Discrimination: Ethnic Inequality and Public Policy*, *The Limits of Social Policy*, and *We Are All Multiculturalists Now*.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

John F. Kain holds the Cecil and Ida Green Chair for the Study of Science and Society as Professor of Economics and Professor of Political Economy at the University of Texas at Dallas. He is past Chair of the Harvard University Economics Department, and Henry Lee Professor of Economics and Professor of Afro-American Studies Emeritus at Harvard. He has written widely on issues of race, education, and urban society.

Thomas J. Kane is Professor of Policy Studies and Economics at the University of California at Los Angeles. He is also a nonresident Senior Fellow at the Brookings Institution. He has studied and published extensively on issues of race and higher education. His most recent book is *The Price of Admission: Rethinking How Americans Pay for College*.

Douglas Massey is Professor and Chair of the Sociology Department at the University of Pennsylvania. He has studied and written extensively on demography, urban sociology, and race/ethnic relations. He is a past President of the American Sociological Association and current member (since 1998) of the National Academy of Sciences. He is most recently lead author of *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities*.

Marta Tienda is Maurice P. During '22 Professor in Demographic Studies and Professor of Sociology and Public Affairs at Princeton University. She has studied and published extensively on various aspects of race and ethnic inequality. She is co-author of *The Color of Opportunity: Pathways to Family, Work, and Welfare in the Inner City* and *The Hispanic Population of the United States*. She is past President of the Population Association of America.

Brian Bucks is a Ph.D. candidate in Economics at the University of Wisconsin-Madison. His doctoral dissertation focuses on the effects of the adoption of facially race-neutral higher education policies in Texas.

SUMMARY OF ARGUMENT

This brief presents social science research that bears directly on whether the admissions policies of the University of Michigan (the "University") satisfy strict scrutiny. Specifically, this brief draws upon *amici's* original research—including the most extensive body of original research conducted to date regarding the Texas plan adopted following the Fifth Circuit decision in *Hopwood*—to demonstrate that the "percentage plans" advocated by the United States[2] in its *amicus* briefs are not preferable, more narrowly tailored, race-neutral alternatives.

Amici's own research and their review of academic literature addressing the subject have convinced them that the careful use of racial preferences in higher education admissions, such as those at issue in these cases, is in fact more narrowly tailored than the percentage plans, for several reasons.

First, it is not clear that these plans are actually race-neutral, and counsel for petitioners and their *amici* have made statements suggesting that these alternatives likely will be challenged as unconstitutional. Second, these plans are both less effective and less efficient than *Bakke*[3] "plus factor" affirmative action admission criteria. Third, in their pure form, percentage plans require admissions officers to reserve places for students from a defined pool of in-state applicants based upon a single criterion, and to ignore all other criteria that predict college success. Finally, percentage plans are very new and largely untested, and they depend upon the presence of a large and segregated minority high school population, as well as costly scholarship, financial aid, retention and recruitment programs directed toward minority applicants.

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[2] These plans are also advocated by the State of Florida's *amicus* brief.

[3] *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 316-19 (1978) (opinion of Powell, J.) (discussing the example of Harvard College's "plus-factor" admissions policy).

For these reasons, this Court should not invalidate race-conscious admissions programs based upon the existence of these percentage plan alternatives. It should instead provide states the leeway necessary for them to find the programs best suited to the educational mission of their institutions and the particular characteristics of their applicant pools.

ARGUMENT

I. DESCRIPTION OF THE TEXAS, CALIFORNIA, AND FLORIDA PERCENTAGE PLANS.

In order to evaluate the United States' proposed race-neutral alternatives to plus factor admissions programs, it is important to understand how the only concrete alternatives put forward actually function.

A. TEXAS

In 1996, the Fifth Circuit ordered Texas to eliminate all race-conscious affirmative action in university admissions decisions. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In response to *Hopwood*, the Texas legislature passed H.B. 588, which guarantees Texas public high school students who graduate in the top 10% of their class admission to any Texas public college or university. *See* Tex. Educ. Code Ann. § 51.803; Marta Tienda *et al.*, *Closing the Gap? Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action* 2 (2003).[4] The first class admitted under the 10% plan matriculated in the 1998-99 academic year. *Id.* at 12 n.16. Texas' plan has been supplemented by intensive financial aid, recruitment, and retention programs aimed at low-income schools with large numbers of minority students. *See infra* Section III.B.

B. CALIFORNIA

[4] *Available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

In 1995, the University of California ("UC") Board of Regents implemented SP-1, which eliminated the use of race and ethnicity in admissions. A year later, California voters approved Proposition 209, which amended the state constitution to ban race-conscious admissions decisions in the state's public education system. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 16 (2003).[5] Proposition 209 was fully implemented for students entering the UC system in the Fall of 1998. U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* 4 (2002).[6]

In the Fall of 2001, California implemented Eligibility in the Local Context ("ELC"), which guarantees that the top 4% of each high school graduating class in the state will be admitted to one campus in the university system. Horn & Flores, *supra* at 17, 19-20. For students admitted in the Fall of 2002, the UC system implemented a "comprehensive review" policy, which permits each campus to set admissions standards based on ten academic and four non-academic supplemental criteria, two of which may relate to socioeconomic status.[7] *Beyond Percentage Plans*, *supra* at 5. Comprehensive review had been in place at the University of California at Berkeley ("Berkeley") since 1998; however, it only applied to the 50% of admissions for which the UC system, until 2002, allowed

[5] *Available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#fullreport.

[6] *Available at* http://www.usccr.gov/pubs/percent2/ch2.htm.

[7] These two supplemental criteria are: (1) Academic accomplishments in light of disability, low family income, first generation to attend college, need to work, disadvantageous social or educational environment, difficult personal and family situations or circumstances, refugee status, or veteran status; and (2) location of the applicant's secondary school and residence. Office of Vice Chancellor, First Year Implementation of Comprehensive Review in Freshman Admissions (hereafter, "Vice Chancellor's Report"), at Appendix A-vi (2002), *available at* http://www.ucop.edu/regents/regmeet/nov02/302attach.pdf.

consideration of nonacademic criteria. *Id.* at 5; Horn & Flores, *supra* at 54.

C. FLORIDA

In February 2000, pursuant to a request from Governor Bush in his "One Florida" executive order, Exec. Order No. 99-281, the Florida State Board of Education banned consideration of race in admissions decisions for the state's higher education institutions, *see* Fla. Admin. Code Ann. R. 6C-6.002(7). Patricia Marin & Edgar K. Lee, *Appearance & Reality in the Sunshine State: The Talented 20 Program in Florida* 9 (2003).[8] Florida's colleges and universities, however, remain entirely free to consider race and ethnicity in awarding scholarships and other financial aid, conducting outreach, and developing pre-college summer programs. *Id.* at 10.

Florida's percentage plan, the "Talented 20" program, took effect in the Summer of 2000. *Id.* at 28. Under the Talented 20 program, students who graduate from Florida's public high schools in the top 20% of their class, complete nineteen specific academic credits, and take an SAT or ACT test are guaranteed admission to one of eleven state universities, although not necessarily admission to the institution of the student's choice. *Id.* at 7 n.2, 9. Talented 20 students receive special consideration only after being rejected by three state institutions. *Id.* at 19. Some of Florida's universities began admitting Talented 20 students in 2000; the University of Florida ("UF"), however, apparently used plus factor admissions that year, and did not begin admissions until 2001. *Id.* at 28-29.

II. UNDER STRICT SCRUTINY, FACIAL RACE-NEUTRALITY, EVEN IF PREFERRED, CANNOT OUTWEIGH LESS-NARROW TAILORING.

[8] *Available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php.

The University's admissions policies comport with the Equal Protection Clause of the Fourteenth Amendment if they: (1) further a "compelling state interest," and (2) are "narrowly tailored" to furthering that interest. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring).

This brief presents social science research that bears directly on whether the University's admissions policies meet the second prong of this exacting test.[9] *Amici* start from the same premise as the United States in its briefs, namely, that the respondents have a very strong interest in the educational benefits which flow from racial diversity—a student population in which traditionally under-represented racial minorities are present in meaningful numbers. *See* U.S. Br. (*Gratz*) at 13; U.S. Br. (*Grutter*) at 8, 13. Indeed, *amici* believe that this interest is one that may truly be characterized as "compelling." This belief stems from the experience of *amici* as university faculty that meaningful racial diversity enhances learning and the exchange of ideas in higher education. Furthermore, it is well-established that minority students, if admitted to selective educational institutions, are more likely to graduate and to succeed in their post-collegiate careers than their counterparts who attend less selective institutions. Thomas J. Kane, *Racial & Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* 443, 447 (C. Jencks & M. Phillips eds., 1998).

Narrow tailoring refers to the fit between the means and the end—*i.e.*, the extent to which the means achieve the stated compelling interest, while also minimizing effects beyond that interest. *See Shaw*, 517 U.S. at 908 ("'The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.'") (quoting

[9] Although this brief focuses primarily on the University's undergraduate admissions policies, much of the information it presents is also relevant to law school admissions policies. Therefore *amici* file this brief in both cases.

Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280 (1986) (plurality opinion)); *id.* at 914 ("Although we have not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose."); *Shaw v. Reno*, 509 U.S. 630, 655 (1993) (plan not "narrowly tailored" if it goes "beyond what [is] reasonably necessary" to accomplish goal); *Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring) (narrow tailoring satisfied where state pursues compelling interest through means which both "substantially address" that interest and do not "deviate substantially" from what is necessary).

Contrary to the assertions of the United States, *see* U.S. Br. (*Gratz*) at 11, U.S. Br. (*Grutter*) at 17-18, this Court has never grafted an automatic preference for facial race-neutrality onto the narrow tailoring test. Indeed, this Court's precedents make plain that facially race-neutral state action that is motivated by racial concerns is no less subject to judicial scrutiny than an explicitly race-conscious one. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995) ("[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race-neutral on their face, they are motivated by a racial purpose or object."). Moreover, it is hard to see why a facially race-neutral and therefore indirect means would "fit" a race-conscious goal better than means designed to reach those goals directly. *See* Ian Ayres, *Narrow Tailoring*, 43 U.C.L.A. L. Rev. 1781 (1996).

Even assuming, however, that race-neutral alternatives must always be explored, they are not preferred where they are less narrowly tailored than a race-conscious alternative. *Cf. Wygant*, 476 U.S. at 280 n.6 (plurality opinion) (nonracial approach must "promote the substantial interest about as well"). As the social science data that *amici* present below demonstrates, the only examples of race-neutral alternatives

discussed in the briefs of the United States would be significantly less narrowly tailored than the University's current policy. Thus, they do not provide a constitutionally preferable benchmark against which to assess the University of Michigan's *Bakke*-style plus factor admissions programs.

III. THE "PERCENTAGE PLANS" ADVOCATED BY THE UNITED STATES AND THE STATE OF FLORIDA ARE NOT TRULY RACE-NEUTRAL.

Even if the United States were correct that race-neutral means are always more narrowly tailored than race-conscious approaches, the percentage plans currently in operation in Texas, California, and Florida, would not deserve such preference because they are not truly race-neutral.

A. THE PURPOSE OF THE PERCENTAGE PLANS IS TO INCREASE RACIAL DIVERSITY.

The purpose of percentage plans is avowedly to promote the government interest in racial diversity that the plaintiffs in these actions decry. Public officials involved in the programs have acknowledged this publicly, and measure the programs' success in terms of attracting students from underrepresented minority groups.[10] Moreover, these plans take advantage of, and depend on the continuing existence of, high degrees of racial segregation in the states' high schools. *See infra* Section IV.C.4. It is difficult to see, therefore, how they can truly be considered a "race-neutral" measure for assessing Michigan's programs.

Indeed, lawyers for both the Center for Individual Rights and the Center for Equal Opportunity have signaled interest in

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[10] *See* Horn & Flores, *supra* at 15-19; Marin & Lee, *supra* at 11; John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* 3-4 (2003), *available at* http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper26.html.

moving on after this case to challenge these aspects of the Texas program. The Center for Equal Opportunity has attacked Texas' percentage plan, stating that "while the percentage plans are better than 'racial preferences,' they still amount to a thinly veiled system of selecting students by race" and that it "think[s] these plans are very vulnerable to a legal challenge."[11] Similarly, the Center for Individual Rights has written that it "see[s] substantial problems with the [Texas] plan" due to the fact that it "furthers racial diversity on campus because it effectively applies a lower admissions standard to applicants from predominantly minority schools—in effect using a race-based double standard to engineer a specific racial mix."[12] Thus, even were this Court to relegate admissions nationwide to the percentage plan approach, it appears this would only spawn new challenges.

B. PERCENTAGE PLANS' RESULTS DEPEND UPON RACE-TARGETED FINANCIAL AID AND OUTREACH PROGRAMS.

While Texas, California and Florida have adopted admissions criteria that are facially race-neutral, these criteria are but one feature of their higher education admissions policies. In practice, they operate in tandem with financial aid and outreach programs that target minority students, and that are used in order to maintain racial diversity.

The One Florida program ended race-consciousness in higher education admissions decisions, but not in financial aid, support or recruitment. Marin & Lee, *supra* at 9. The University of Florida ("UF"), Florida State University ("FSU") and the State Board of Education each offer race-targeted scholarships. *Id.* at 36.[13] UF provides four-year scholarships to

[11] Michael A. Fletcher, "Race Neutral Plans Have Limits In Aiding Diversity, Experts Say," *Wash. Post*, Jan. 17, 2003, at A12.

[12] Curt A. Levey, "Texas' 10 Percent Solution Isn't One," *Wash. Post*, Nov. 12, 2002, at A24.

[13] *See also* Student Financial Affairs Scholarship Central, *available at* http://www.ufsa.ufl.edu/sfa/programs/scholarhq.html; Student Financial Affairs, State of Florida Aid, *available at* http://www.ufsa.ufl.edu/sfa/programs/fl/floridaaid.html.

students from five urban high schools chosen for their high minority population and failing school status. *Id.* at 33. It has also hired a full-time Minority Outreach Coordinator to coordinate financial aid and admissions efforts targeting minority students. *Id.* at 32. FSU also provides minority students with special summer programs and recruits heavily in South Florida, an area with many communities that are predominantly African-American and Hispanic. *Id.* at 35.

Following implementation of Texas' 10% policy, UT began awarding scholarships to low income students under its Longhorn Scholars program. Tienda, *Closing the Gap?* at 13. These scholarships are awarded to top decile students from a finite group of targeted high schools in Texas.[14] Approximately 86% of UT's Longhorn Scholars are Hispanic or African-American.[15] Texas A&M implemented a comparable program, Century Scholars, and began awarding scholarships to top 10% students from targeted high schools in 2000. *Id.*[16] Even comparing schools within the same economic strata, the Longhorn Scholar and Century Scholar programs target significantly greater minority-population schools. Marta Tienda & Kim Lloyd, *UT's Longhorn Opportunity Scholars (LOS) and A&M's Century Scholars Programs*.[17]

Financial aid packages offered under the Longhorn and Century Scholars programs appear to have played a large role in the limited results Texas' 10% policy has produced.[18] When

[14] For a list of the targeted schools, *see* Connexus, Longhorn Scholars, *available at* http://www.utexas.edu/student/connexus/scholars/index.html.

[15] C. Irving, "Texas' 'Ten Percenters,'" National CrossTalk, Vol. 10, No. 3 at 14 (Summer 2002), *available at* http://www.highereducation.org/crosstalk/pdf/ct_summer02.pdf.

[16] *See also* Scholarship Information for Freshman Students, *available at* http://honors.tamu.edu/honors/scholarships/freshman.htm.

[17] *Available at* http://www.texastop10.princeton.edu/publications.htm.

[18] *See* C. Irving, "Texas' Demographic Challenge," National CrossTalk, Vol. 7, No. 2 (Spring 1999), *available at* http://www.highereducation.org/crosstalk/ct0499/news0499-texas.shtml; "A Progress Report: President Larry

UT implemented the Longhorn Scholars program in 1999, enrollment of African-American and Hispanic students increased by 1.1 and 0.7%, respectively, compared with increases of 0.3 and 0.6% the first year of the 10% plan. Brian Bucks, *The Effects of Texas' Top Ten Percent Plan on College Choice* 11 (2003).[19] At Texas A&M, the proportion of enrollees that were Hispanic decreased 0.5% in 1999, but increased 1.4% to recover some post-*Hopwood* loss in 2000, when Texas A&M began awarding Century Scholars scholarships. *Id.*

California universities also provide significant scholarship funds to attract under-represented students. Like Texas' Longhorn and Century Scholars, Berkeley runs at least three scholarship programs for students from targeted high schools, many of which are have majority-minority student populations. Horn & Flores, *supra* at 55; *see* The National Center for Education Statistics Common Core of Data, 2000-2001 ("NCES Data").[20] Similarly, the University of California at Los Angeles' ("UCLA's") Blue & Gold Scholarships provide scholarships to students from targeted high schools in the Los Angeles area, many of which have large minority student populations. *Id.* at 56; *see* NCES Data, *supra*.

R. Faulkner offers update on campus reorganization, UT's achievements and soaring energy costs," On Campus, Feb. 27, 2001, at 2, *available at* http://www.utexas.edu/admin/opa/oncampus/01oc_issues/oc010227/oc010227.pdf ("Through efforts such as the Longhorn Opportunity Scholarships and the UT Ex-Students' Association's Texas Leader Scholarships, we are attracting more outstanding minority students to our campus. In the freshman class, we have made gains in Hispanic and African-American participation large enough to have erased the losses caused by the Hopwood decision.").

[19] *Available at* http://www.utdallas.edu/research/greenctr/papers/pdfpapers/paper34.pdf.

[20] Demographic data for each school are available at http://www.nces.ed.gov/cc/bat.

IV. PERCENTAGE PLANS ARE NOT MORE NARROWLY TAILORED THAN PLUS FACTOR PROGRAMS.

Even if one were to accept the proposition that these facially race-neutral percentage plans are indeed race-neutral, these alternatives are much less narrowly tailored and cannot be preferred to the *Bakke*-style plus-factor programs like the University's. The percentage plans, both as currently implemented and as they would operate in Michigan, do not achieve the goal of racial diversity nearly as well as plus factor programs and carry far more undesirable consequences.

A. ATTEMPTING TO ACHIEVE RACIAL DIVERSITY THROUGH PROXIES, RATHER THAN DIRECTLY, PRODUCES SIGNIFICANT INEFFICIENCIES

Plus factor admissions regimes are the most efficient way for schools to achieve diversity while admitting the most highly qualified applicants of all races. These regimes permit admissions officers to evaluate each candidate's entire application file as a whole, instead of mandating that any single characteristic be entirely dispositive. They thereby permit schools to admit candidates who demonstrate the greatest likelihood of academic success following enrollment. As *amicus* Glenn Loury shows, this is particularly important because admissions officers generally have great difficulty predicting subsequent performance from the standardized test scores and high school grades of eighteen-year-old applicants. *See* Glenn C. Loury *et al.*, *Research Memorandum on "Color-Blind Affirmative Action,"* Tables 5 & 7 (2003).[21] Admissions committees therefore take other information into account—by reading applicant essays, examining extra-curricular activities, and considering the quality of instruction at particular high schools, for example—that adds great value to forecasting post-

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[21] *Available at* http://www.bu.edu/irsd/researchmemorandum.pdf.

admission outcomes. *Id.* at 3. By contrast, percentage plans introduce formulaic evaluation practices that limit this "whole file review" process, and thereby impair the effectiveness of admissions decision-making. *Id.* at 4.

The inherent inefficiency of regimes that attempt to achieve racial diversity without explicitly considering race as a factor is demonstrated by Professor Loury's analysis using actual admissions data from seven elite institutions that employ affirmative action and data regarding the subsequent academic performance of admitted students. *Id.* at 1-2, Table 5. Professor Loury's model shows that if an admissions office attempted to devise a system that achieved the prior degree of racial diversity without explicitly considering race, it would be far less likely to select an incoming class of minorities and white students who would perform as well academically. *Id.* at 2, 4, Table 5. Such race-neutral admission policies would necessarily give less weight to academic factors and more weight to social background factors. *Id.* at Table 7. Applying this type of race-neutral admissions method to a pool of candidates for whom subsequent academic performance is known reveals that race-neutral policies are far less efficient than current plus factor admissions programs because they would select students who generally perform *worse* in college than the students chosen under the current plus factor system. The efficiency loss from using such race-neutral factors to achieve racial diversity can be three to four times greater than in regimes in which race may be considered. *Id.* at Table 5. In fact, the model shows that race-neutral admissions methods for achieving diversity would be even *less* efficient in admitting good students than admissions systems that abandon diversity as an objective altogether and also *completely ignore* high school class rank. *Id.* at Table 5; *see also* Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action*, in *Chilling Admissions* 17, 26-28 (G. Orfield & E. Miller eds., 1998) (in order for a class-based admissions system to produce significant racial diversity, it

would need to weigh factors such as lack of parents' education and low SAT scores very heavily).

Through single-minded focus on class rank, pure percentage plans do violence to traditional methods of assessing students for admission on an individual basis and are much less narrowly tailored than the University's admissions criteria. By guaranteeing a large number of positions to applicants who meet a simplistic admission criterion or set of criteria, these programs resemble the quota system at issue in *Bakke*, make admission to one or all state higher education systems a numbers game, and may significantly alter the character of the institutions that use them.

B. PERCENTAGE PLANS HAVE HAD UNDESIRABLE CONSEQUENCES THAT WOULD BE WORSE IN MICHIGAN AND OTHER STATES NATIONWIDE.

That the theoretical predictions of Professor Loury are borne out in practice can be seen in the undesirable consequences that percentage plans create through their indirect use of race. The plans have altered admission criteria for all of the applications submitted under the plan, while also impairing the schools' ability to identify and admit the strongest minority candidates.

1. Percentage plans affect many more decisions than necessary.

African-American and Hispanic students comprise a small percentage of high school graduates in most states and, comprised only 23% of all students in the entire country who graduated from high school in 1992. Kane, *Racial & Ethnic Preferences in College Admissions*, *supra* at 449. As a result, percentage plans aiming to produce meaningful representation of minority students will necessarily affect far more admissions decisions than those regarding the minority applicants they are designed to help. Last year, 54% of admissions decisions at the

University of Texas at Austin ("UT") were determined solely by the top 10% requirement. *See* Bucks, *supra* at 9.

By contrast, plus factor admissions programs affect a very small number of admissions decisions. For example, *amicus* Marta Tienda's intensive study of admissions programs at UT and Texas A&M found that at most 5% of decisions were affected by the pre-*Hopwood* plus factor admissions program. Tienda, *Closing the Gap?* at 32.

2. Percentage plans cause disruptions in total enrollment.

Percentage plans are a very blunt instrument, particularly in the restricted freedom they afford universities to control their entering class. As *amicus* John Kain has noted, following implementation of the 10% plan, UT scaled back its Summer and Provisional enrollment programs because the plan had so enlarged freshman class sizes. Kain & O'Brien, *supra* at 8-9.[22] The percentage of students enrolling in UT & Texas A&M through the Texas plan has increased steadily. Bucks, *supra* at 9. In fact, if all of the more than 21,500 students eligible for admission under the program applied, the plan would require these institutions to admit 1.5 times the total current freshman class of both institutions combined. *See Texas Education Association 2000-2001 Graduates by Graduation Plans, Statewide Totals* (215,316 graduating seniors in 2001);[23] Bucks, *supra* at 11, Table 3.

3. Percentage plans lead to disproportionate rejection of qualified minority students below the percent cut-off.

The 10% plan has been widely criticized for denying admission to highly qualified students from elite suburban schools who are not in the top decile of their class. However,

[22] As explained in Section IV.D *infra*, admissions systems based upon socioeconomic criteria will have similar overbroad effects.

[23] *Available at* http://www.tea.state.tx.us/adhocrpt/adstg01.html.

the most pernicious effect of the Texas 10% plan on admission of undergraduates to UT and Texas A&M is a greater rate of rejection of African-American and Hispanic students falling below the 10% cut-off than of white students with similar class rank. Thus, critics' contention to the contrary notwithstanding, the probability of comparable white students being admitted to UT actually rose after implementation of the 10% plan.

Before the Texas 10% program, more than 90% of applicants in the top decile of their class were admitted to UT and Texas A&M. Tienda, *Closing the Gap?* at Table 5. Thus, the program improved admission rates for minority students in the top decile only marginally. *See id.* Meanwhile, after implementation of the plan, the admissions probability of African-American and Hispanic students in the second decile *declined* at both institutions, while the admissions probability of white students in this part of the graduating class *increased*. *See id.* For example, at UT, the admissions probability of African-American and Hispanic students in the second decile declined 4.9% points and 2.3% points, respectively, after *Hopwood*. *See id.* During that same period, the probability of white students being admitted to UT rose 10.7% points. *See id.*

The principal impact of the Texas 10% plan occurs in the lower deciles. Immediately below the top 10% cut-off, African-American and Hispanic students are disproportionately rejected from state flagship institutions vis-à-vis their white counterparts in the second decile of their graduating class. *Id.* at 42. This disparity widens even further in the third decile. *Id.* at 26; *see also id.* at Table 5. Thus, African-American and Hispanic students who would have been admitted under the pre-*Hopwood* admissions system are now significantly more likely than their white counterparts to be rejected. *See id.* at Tables 5 & 6.

4. Minority enrollment has "cascaded" to less selective state institutions under percentage plans.

The Texas 10% plan has produced a pattern of "cascading" African-American and Hispanic student enrollment toward less selective state schools. As of last year, the share of African-Americans enrolling at UT and Texas A&M, the state's flagship institutions, has been below pre-*Hopwood* levels each year that the Top 10% plan has been in place. Kain & O'Brien, *supra* at Addendum Table 2. The share of Hispanic students attending these universities has been lower in each of these years than in all but one year of race-conscious admissions programs. *Id.* Perhaps most startlingly, if one controls for all factors other than race, under the Texas 10% plan, African-Americans and Hispanics actually have a *lower* probability of attending one of Texas' top public schools than do whites of similar ability, performance and family background. *Id.* at 24-25. In particular, "black and Hispanic students attending the most competitive and highest quality suburban high schools appear to be enrolling in [Texas'] selective public universities in smaller numbers." *Id.* at 30.

Under the 10% plan, the likelihood that African-Americans and Hispanics will attend one of Texas' selective public universities has declined relative to that of equally qualified whites, while their likelihood of attending one of the State's less selective public universities has increased. For example, the probability of an African-American high school graduate from Texas enrolling in a public institution other than UT, Texas A&M or UT-Dallas (a much smaller selective institution), relative to whites of the same academic credentials, increased from 0.7% in 1996 to 8.6% in 1999 and 7.5% in 2000. *Id.* at 25.

Data from California likewise suggest redistribution of African-American and Hispanic[24] students from higher tier schools to lower tier schools within the UC system. Minority representation at both UCLA and Berkeley has fallen dramatically since Proposition 209, while African-American

[24] UC provides data disaggregated for Chicano and Latino students; both are described as "Hispanic" here.

and Hispanic representation has increased at less selective institutions. University of California, Office of the President, *Final Summary of Freshman Applications, Admissions and Enrollment, Fall 1995-2001* (hereafter "Freshman Final Summary") at 1.[25] From 1995 to 2001, total freshman enrollment at both Berkeley and UCLA increased, but the number of African-American and Hispanic students enrolling at each campus decreased. *Id.* The combination of lower enrollment numbers and a larger freshman class resulted in African-Americans and Hispanics constituting a significantly smaller percentage of the freshman class at both Berkeley and UCLA in 2001 than they did in 1995 despite significant increases in the shares of underrepresented minority students among California high school graduates. *See infra* Section IV.C.4.a.

5. Percentage plans have required expensive increases in financial aid and outreach programs in an attempt to maintain diversity.

Targeting scholarships, financial aid, and intensive recruitment efforts to students in high schools that contain overwhelming majorities of African-American and Hispanic students is a critical factor in the limited success of percentage plans in Texas, Florida, and California. *See infra* Section III.B. The availability of funding for these programs, however, is often dependent on state budgets. This makes enrollment of disadvantaged high performing students vulnerable to substantial cuts in state budgets being implemented in many states this year. *See, e.g.*, Horn & Flores, *supra* at 51 n.37 (noting the decline in California's funding of outreach programs from $200 million in 1998 to a proposed $47 million in 2003-2004).

C. PERCENTAGE PLANS HAVE NOT ACHIEVED SUCCESS AT PROMOTING

[25] *Available at* http://www.ucop.edu/news/studstaff.html.

DIVERSITY AS CLAIMED, AND WOULD DO WORSE IN MICHIGAN.

Not only do percentage plans cause significant inefficiencies and undesirable secondary effects, but these plans also have generally failed to maintain the levels of racial diversity present in selective institutions under plus factor plans. Moreover, whatever modest "success" these plans have achieved in Texas, California, and Florida is highly dependent on unique demographic circumstances not present in Michigan or, for that matter, much of the nation.

1. Unlike *Bakke*-type plus-factor plans, percentage plans are new and untested.

Alternative plans are still very new, making it too early to gauge their results definitively.[26] Further, as the One Florida Accountability Commission itself stated in its 2002 report, "it is not possible to accurately measure the impact of this program." *One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida*, at 5 (June 2002).[27] As the experience in all three states illustrates, they are also dynamic programs, with state legislatures and educational institutions frequently reconsidering their criteria. *See supra* Section I. This reason alone counsels against using early results of any of these programs as a yardstick against which to invalidate programs that have been in place since *Bakke*. Indeed, when the University implemented its current admissions program in 1998, Texas had admitted the first students under its 10% plan

[26] *Cf.* Matt Flores, "Top 10% Admissions Rule Could See Changes in Austin; Wentworth Would Toughen The College-Prep Menu in Texas High Schools," *San Antonio Express-News*, Feb. 7, 2003 (citing statement by Michael A. Olivas, who helped draft the top 10 percent legislation, that the law hasn't been implemented long enough to measure its impact).

[27] *Available at*

http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc.

that same year, and neither Florida nor California had even adopted their percentage plans.

2. Because University of Michigan is among the most competitive institutions nationwide, UC Berkeley and UCLA provide the most valid comparisons.

The University of Michigan, Berkeley and UCLA are three of the four most highly ranked public universities in the United States. *See e.g.*, U.S. News & World Report, *America's Best Colleges* 87 (2003 ed.). Both of Michigan's California peers have seen significant declines in minority admission and enrollment rates since abandoning plus factor admissions. For this reason, the results of a percentage plan with some form of whole-file review in Michigan are most likely to be similar to the significant declines in post-Proposition 209 minority admissions and enrollment at UCLA and Berkeley. *See infra* Section IV.C.3.c.

Data regarding minority admissions and enrollment in the selective, but less competitive, institutions in Texas and Florida are of little relevance to the effects on the respondents of switching to the alternatives advanced by the United States. Enrollment at even less selective institutions is even less relevant. Consideration of race as one of many plus factors in admissions decisions to promote racial diversity generally occurs only in highly selective colleges and universities. Kane, *Racial and Ethnic Preferences*, at 432; William G. Bowen & Derek Bok, *The Shape Of The River* 15 (1998).

3. On balance, percentage plans have not maintained previous levels of racial diversity.

Contrary to claims that percentage plans have succeeded in maintaining meaningful racial diversity vis-à-vis former plus-factor programs in Texas, California and Florida, adoption of these plans often has led to significant drops in African-American and Hispanic enrollment at the selective institutions in those states. These declines—which occurred despite rapidly

growing minority high school populations in all three states—indicate that any limited "success" in obtaining diversity since adoption of the percentage plans in those states could not be replicated in Michigan.

a. Texas.

As compared to admissions outcomes in 1992-1996, the years just prior to *Hopwood* and the 10% policy, the percentage of African-American and Hispanic admittees to UT and Texas A&M has declined. Tienda, *Closing the Gap?* at 15, Table 2. This decline occurred despite the fact that the numbers of minority high school graduates in Texas are growing much more rapidly than the numbers of white high school graduates. *See infra* Section IV.C.4.a. In addition, measurements, such as those cited by the United States, *see* U.S. Br. (*Grutter*) at 15, that use 1996 enrollment as a yardstick to assess the effects of the Texas 10% plan tend to overstate the plan's effects. Minority enrollment at UT declined steadily between 1993 and 1996, reaching its lowest level in 1996, while minority enrollment at Texas A&M fell significantly versus the previous two years.[28] *See* Bucks, *supra* at 11, Table 3; *see also* University of Texas Statistical Handbook, 2002-2003, Students Table 16.[29]

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[28] Susanna Finnell, former Executive Director of the Office of Honors Programs and Academic Scholarships at Texas A&M, has written that, although *Hopwood* did not directly affect admissions decisions for the entering class of 1996, the signal it sent had a "chilling" effect on minority acceptances. Susanna Finnell, *The* Hopwood *Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in *Chilling Admissions* 72-73. Thus, 1996 is likely not even a truly "pre-*Hopwood*" year.

[29] *Available at* http://www.utexas.edu/academic /oir/statistical_handbook/02-03/students/s16/. Further, returning Texas to its pre-*Hopwood* levels of diversity would not be an achievement worthy of emulation. Texas' history of *de jure* racial segregation and resistance to eliminating its vestiges led to several investigations by the Department of Education's Office for Civil Rights ("OCR"). *See Hopwood v. Texas*, 861 F. Supp. 551, 554-57 (1994), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996). As recently as 1999 OCR found that "disparities traceable to *de jure* segregation still existed" in Texas. Horn & Flores, *supra* at 14.

b. Florida.

Because the Talented 20 program was not fully implemented on all campuses until Fall 2001, the results of this program are even newer and less reliable. Moreover, only one of Florida's selective state universities, the University of Florida, still used a plus factor admissions program to increase diversity at the time the Talented 20 program was adopted. Horn & Flores, *supra* at 13; Marin & Lee, *supra* at 34. Nonetheless, at best, the Talented 20 has shown mixed results at maintaining diversity in Florida's more selective universities.

The Talented 20 program really did no more than place a "guaranteed admission" label on students, the vast majority of whom already met the system's minimum eligibility requirement of a 3.0 GPA and completion of certain academic units. Marin & Lee, *supra* at 21-22. Fewer than one percent of all Talented 20 students were likely to need the program's guarantee to gain admission to the system; the program helped perhaps a handful of the 20,000 students labeled Talented 20. *Id.* at 22.

At UF, the end of race-conscious affirmative action initially produced a significant decline in racial diversity of both admitted and enrolled students. In 2001, the first year of the Talented 20 program, overall African-American student admissions and enrollment at UF declined significantly from the previous year.[30] *Id.* at 30-31, 37. Specifically, African-American admissions declined from 12.9% in 2000 to 9.4% of all admissions to UF in 2001; enrollment declined from 11.8%

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[30] The United States and Florida both understate this decline by comparing results against a baseline of 1999-2000, rather than 2000-01 data. *See* U.S. Br. (*Grutter*) at 16; Fla. Br., at 9. However, minority enrollment at UF increased in 2000-01 over the previous year consistent with a trend in other recent years in which UF used plus factor admissions. Marin & Lee, *supra* at 28-29, 31. This trend in increasing minority enrollment crashed to a halt with the implementation of the One Florida initiative in 2001-02.

to 7.2% during that period. *Id.* at 30-31. Between 2000 and 2001, UF's total minority enrollment decreased from 32.5% to 26%. Beyond Percentage Plans, *supra* at 47; *see also One Florida Accountability Commission*, Chart 7.[31]

At FSU, which did not use race-conscious admissions and had low minority enrollment rates in the year before the Talented 20 program was implemented, the percentage of minority students in the campus population has increased—moving from 23.1% in 1999 to 25.6% in 2001. *Beyond Percentage Plans, supra* at 47. However, FSU's admissions director denies any connection between this increase and Talented 20 program, indicating that almost all admissions decisions were made without knowledge of which applicants were part of the program. Marin & Lee, *supra* at 36. Moreover, the percentage of minority students at FSU remains below both that at UF and that of the Florida system as a whole. *Beyond Percentage Plans, supra* at 47-48.

c. California.

It is likewise too early to judge the results of California's 4% Plan and its "comprehensive review" policy because only two classes have been admitted under the 4% Plan, and only one under the "comprehensive review" policy. Horn & Flores, *supra* at 42; *Beyond Percentage Plans, supra* at 6. Moreover, little data are available for the results of the first year of the "comprehensive review" policy.[32]

Those data indicate that California's alternative policies have been ineffective at maintaining pre-Proposition 209 levels of diversity in its university system, notwithstanding the

[31]Data chart *available at* http://www.myflorida.com/myflorida/government/otherinfo/documents/enrollment3.xls.

[32]The increase in the number of California university applicants who decline to provide racial/ethnic information also makes analysis difficult. In 1998, the number of students who did not provide such information increased from approximately 4% to more than 14%. The number now stands at around 7%. Horn & Flores, *supra* at 32 n.34.

growth of California's minority population. In 1995, African-Americans comprised 4.4% of admittees to California's university system. As of 2001, their percentage stood at 3.4%. *Freshman Final Summary, supra* at 1. Hispanic admittees similarly decreased, falling from 15.8% in 1995 to 14.6% in 2001. *Id.*

At the most selective state institutions, Berkeley and UCLA, admission rates of minority students have fallen to even lower levels. At Berkeley, admission rates of African-American students fell from about 7% in 1995-1997, to about 4% in 2001. *See id.* Berkeley admission rates of Hispanic students also declined from 18.5% in 1995 to 12.5% in 2001. *See id.* UCLA admission rates of African-American students fell from 6.7% to 3.3% between 1995 and 2001, while admission rates of Hispanic students fell from 20.1% to 12.7%. *See id.*

Initial results of the ELC program are disappointing. In 2001, the first year both ELC and "comprehensive review" applied to all Berkeley applicants, underrepresented minorities comprised 16.3% of admittees to that university, well below pre-Proposition 209 levels. Vice Chancellor's Report, *supra* at 17. As of 2001, African-American and Hispanic students comprised only 2.3% and 17%, respectively, of all ELC admittees to the entire state system, and ELC students took up 42% and 39% of admission spaces at Berkeley and UCLA, respectively. University of California Eligibility in the Local Context Program Evaluation Report at 9;[33] Horn & Flores, *supra* at 44. Thus, it is not surprising that the ELC program has not resulted in any appreciable increase in minority admissions at California's most selective universities. Admission rates of African-American and Hispanic students remain well below admissions rates before Proposition 209 at Berkeley and UCLA, the institutions most comparable to the University of Michigan. *Freshman Final Summary* at 1.

[33] *Available at* http://www.ucop.edu/news/cr.

4. Percentage plans' results depend on demographics not present in Michigan.

The limited results of the percentage plans in Texas, Florida, and California are properly understood only in relation to the distribution of the significant minority populations and the significant increases in the percentage of the college-age minority population in those states.

a. Demographic changes in Texas, Florida, and California.

As of 2000, African-Americans and Hispanics together accounted for over 52% of Texas' college-age population. Tienda, *Closing the Gap?* at Table 1. While Texas' college-age Hispanic population grew almost ten percent in the 1990s, the percentage of minority admittees to UT and Texas A&M has declined since the pre-*Hopwood* years. *Id.* at Tables 1 and 2. As of 2000, the last year for which data were available for *amicus* Tienda's comprehensive study of Texas' policy,[34] the percentage of Hispanic admittees to both UT and Texas A&M was below pre-*Hopwood* levels. *See id.* at Table 2; *see also* Kain & O'Brien, *supra* at 6-7.[35]

In the Fall of 2001, African-Americans and Hispanics accounted for over 45% of Florida's public school population. Marin & Lee, *supra* at 12. The percentage of African-American and Hispanic Floridians between the ages of 15 and 19 increased from 34.4% in 1990 to 40.5% in 2000. *Id.* at 12-13.

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[34] Data from UT for 2002 indicates no significant change in minority enrollment versus Tienda's data. *Compare* Tienda, *Closing the Gap?* at Table 2 (3.3% African-American and 13.7% Hispanic) *with* Gary M. Lavergne & Bruce Walker, *Implementation and Results of the Texas Automatic Admissions Law*, Table 1 (3% and 14% African-American and Hispanic enrollees, respectively), *available at* http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf.

[35] In the pre-*Hopwood* years of 1992-1996, African-Americans and Hispanics together accounted for a combined total of 22.2% and 19.4% of admittees to UT and Texas A&M, respectively. Tienda, *Closing the Gap?* at Table 2.

Hispanic Californians between the ages of 15-19 increased from 35% in 1990 to 39% in 2000, while the proportion of whites in that age group dropped ten percent during that same period to 34% in 2000. 1990 Census of Population, General Population Characteristics, California at 183;[36] Horn & Flores, *supra* at 26.

b. These demographics are not present in Michigan and other states.

If minority students often perform less well in high school than their white counterparts, then it follows that for a percentage plan to capture significant numbers of minority students, two conditions must be met. First, the state must have a significant minority high school population. Second, in order to yield a significant number of students at the highest ranks, these minority students must be concentrated largely in schools in which they constitute a majority or supermajority. In other words, there must be a relatively high degree of racial segregation.

Texas is ideally suited to these conditions, as data on minority student concentrations show. *See* Thomas J. Kane, *Concentration of Disadvantaged Minorities in High Schools of Similar Race/Ethnicity.*[37] Texas ranks above the median among states in the proportion of its student population that is African-American and the proportion that is Hispanic, and has the third highest proportion of Hispanic students and of Hispanic and African-American students combined. *Id.* at Table 1. Moreover, anywhere from one-half to three-fourths of these students are in schools which are majority-minority, and anywhere from one-quarter to one-third are in schools that are greater than 90% minority. *Id.* at Tables 1 & 4. Yet, even with these "favorable" demographics for a percentage plan, Texas' approach has not been terribly successful. *See supra*

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[36] *Available at* http://www.census.gov/prod/cen1990/cp1/cp-1-6-1.pdf.

[37] Available at http://www.sppsr.ucla.edu/template/subtemp/dept.cfm?department=ps&submenus=psfaculty&id=350&filenameq=faculty1.cfm.

Section IV.C.3.a. The demographics of Florida and California are not quite as "favorable," but both rank extremely high in percentage of minority students, and over half of those students attend majority-minority schools. *Id.* at Table 4.

As Professor Kane's data show, however, this sort of demographic distribution is not typical of most states. Michigan, for example, has a much lower proportion of total minority students, and while its African-American population is quite concentrated, its Hispanic population is dispersed geographically. *Id.* Other states, such as North Carolina, have been so successful at desegregation that, even though this state has a minority high school population about 10% above the median, only about a third or less of these are in majority-minority schools, and the percent located in significantly concentrated schools is in the single digits. *Id.* at Tables 1 & 4. Still other states, such as Minnesota, have very few minority students, but may still value a racially diverse student body. Relegating states such as these to a percentage plan would effectively end any possibility of achieving racial diversity from in-state students in the foreseeable future. In short, any plan which depends upon a rather unique set of geographic or demographic conditions is hopelessly ineffective as a nationwide solution, because as Kane's data shows, the minority population, and its concentration, is far too variable across the United States.

D. OTHER "RACE-NEUTRAL" ALTERNATIVES WOULD LIKELY FARE NO BETTER UNDER THE NARROW TAILORING TEST.

Some have suggested that other types of facially race-neutral systems, such as class-based affirmative action programs that target very poor high school graduates, offer viable alternatives to plus-factor plans. However, these approaches are not likely to be any more successful or narrowly tailored than percentage plans.

One alternative model that proponents of class-based preferences put forward is preferences based upon low family income. It is true that African-American and Hispanic students are more likely than white students to be socioeconomically disadvantaged, and are three times more likely to come from low income families. However, African-Americans and Hispanics of all incomes are only about 6.8% of the population of high school students with high test scores. Thus, even among the population of low income, high test scores students, African-American and Hispanic students comprise only one of six such students. Kane, *Racial and Ethnic Preferences*, at 450. Accordingly, even assuming it were financially feasible for a college or university to increase its admission of low-income applicants, such an increase would have only a marginal impact on campus diversity. Bowen & Bok, *Shape of the River* at 51.

There may be characteristics other than income, such as family wealth or coming from a single-parent family that would be more highly correlated with race. However, because African-American and Hispanic students *of all income levels* are such a small percentage of high test score youth, it is difficult to find any measure of socioeconomic criteria that would result in admission of a large percentage of minority students in selective institutions that continue to seek students with high test scores. *See* Kane, *Racial and Ethnic Preferences*, *supra* at 448-50.

CONCLUSION

For the foregoing reasons, this Court should find that the admissions criteria at issue in *Gratz* and *Grutter* are narrowly tailored to achieving the compelling interest in the educational benefits of racial diversity, and should affirm the judgment of the district court in *Gratz* and the Court of Appeals in *Grutter*.

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